noted that a member of the Commission once stated that the Commission has no authority "to regulate in any way the construction of buildings ... and that this matter is presently strictly one of local concern and regulation." Id.

2. Federal Policy Under the Communications Act Is to Respect State and Local Prerogatives, Unless Congress Directs Otherwise.

The NPRM correctly observes that the Commission has an obligation to reach a fair accommodation between federal and nonfederal interests. NPRM at ¶ 15. In fact, the Communications Act reflects a clear policy decision on the part of Congress to respect state and local interests in many areas. For example, Title II of the Act recognizes the authority of states to regulate intrastate communications. Title VI of the Act recognizes the authority of local governments over cable franchising. Although the subject matter of Title III does not lend itself to a similar system of dual sovereignty, Congress did not entirely occupy the field when it enacted Title III. Title III reserves control and licensing of radio frequencies in the federal government (Section 301); authorizes the Commission to regulate radio frequency interference (Section 302); and defines the powers of the Commission (Section 303). Nowhere does the Act say that any and all matters impinging in any way on radio and television broadcasting are preempted. See *Illinois Citizens Commission for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972); *Regents v. Carroll,* 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). Therefore, given that by its own admission the Commission is required to consider nonfederal interests, that the Act reflects a general Congressional sensitivity to the rights and prerogatives of state and local governments, and that the Act does not claim exclusive federal authority, the Commission cannot claim that it has the power to unilaterally override local zoning procedures.

3. Section 336(c) Does Not Justify the Proposed Preemption of Local Zoning Authority.

The NPRM implicitly acknowledges that the Commission must be able to point to specific statutory authority to justify the proposed preemption, when it cites Section 336(c) of the Communications Act for the proposition that Congress "indicated its objective of a speedy recovery of spectrum . . . ." NPRM at ¶ 13. The Commission's reliance on Section 336(c) is misplaced, however, as it does not address speedy recovery but rather, places certain requirements on the Commission when it grants licenses to persons who already are licensed to operate television broadcast stations:

> If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

Section 336(c).

This section neither speaks to Congressional policy requiring "speedy recovery" of licenses, nor addresses the time period in which licenses must be returned. In addition, we can find no reference in the legislative history of Section 336(c) to support a "speedy recovery" policy, and we note that neither the NPRM nor the NAB Petition cite any other authority to that effect.

The only provisions that the Commission can point to are Sections 1 and 7 of the Act, which contain general policy statements to the effect that the Commission should promote the development of telecommunications technology in general, but without referring to any specific technology. As the D.C. Circuit noted in *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) at n.77, Section 1 of the Act "sets forth worthy aims toward which the Commission should strive,

[but] it has not heretofore been read as a general grant of power to take any action necessary and proper those ends." Similarly, Section 7 sets forth a general policy and directs the Commission to take certain specific steps to implement that policy, but it is not a broad grant of power.[11]

In addition, the proposed rule provides that all applications for relief from denial of broadcast facilities applications be to the Commission, and further provides for alternative dispute resolution before the Commission and for declaratory relief. In the 1996 Act, Congress was clear that facility siting disputes involving construction, placement, and modification of personal wireless facilities (as opposed to siting disputes related to denials based on radio frequency emissions), must be appealed to the courts, not the Commission. Thus, in the one instance in the Act where Congress expressly addressed appeals from local zoning decision, it placed jurisdiction in the courts, presumably because Congress did not believe that a federal agency should be able to ride over zoning authority which has traditionally been vested in the localities. The proposed rule would appear to grant the Commission jurisdiction over zoning disputes which it does not have, because not expressly granted by the Act.

Thus, the Commission cannot identify any specific provision of the Act that justifies the proposed preemption. Without such authority, the Commission cannot preempt local zoning authority. The Commission may have the authority to promote the development of DTV, but it must respect local authority and set up a regulatory structure that does not interfere with the operations of local zoning laws.

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[11] Nor can the Commission rely on the "necessary and proper clause" of Section 4(i) to justify the proposed preemption. Section 4(i) permits only actions that are "not inconsistent with [the] Act," and preemption of local zoning would be inconsistent for the reasons discussed above.

III. THE COMMISSION IS OBLIGATED TO AVOID RAISING SUBSTANTIAL CONSTITUTIONAL ISSUES UNLESS EXPRESSLY REQUIRED BY STATUTE.

The Commission has an obligation to avoid interpreting the Communications Act in a way that might cause the Commission to violate the Constitution. *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). "Within the bounds of fair interpretation, statutes will be interpreted to defeat administrative orders that raise substantial constitutional questions."[12] In *Bell Atlantic*, the D.C. Circuit Court of Appeals reviewed a Commission order requiring that local exchange carriers make a portion of their facilities available to competitive access providers. The court determined that the Commission's action had created an identifiable class of cases in which application of the rule would lead to takings claims by local exchange carriers. *Bell Atlantic*, at 1446. Because the statute did not expressly confer takings authority on the Commission, the court held that the Commission was not entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and struck down the rule. Id. at 1447. Accordingly, to the extent that the Communications Act might be construed to give the Commission authority to adopt the proposed rules, the Commission must avoid interpreting that authority in a way that raises Constitutional issues. The proposed rules, however, threaten to violate both the Fifth and Tenth Amendments to the United States Constitution.

A. The Proposed Rules Violate The Fifth Amendment To The Constitution Because They Would Effect An Unauthorized Taking of Property, Without Compensation to the Property Owners.

The Fifth Amendment prohibits the Federal government, including the Commission, from taking property for public purposes without compensating the owner. The proposed rule, by overriding City zoning regulations, will permit broadcasters to build thousand foot towers in

residential and limited commercial areas where they are totally incompatible with all existing uses. The result, inevitably, will be diminution in property values. We may fairly presume, however, that the Commission has no plans for compensating property owners throughout the nation for such reductions in their property values. Congress has not appropriated funds for compensation. The Commission has no mechanism or procedures for valuing property and paying compensation, and to our knowledge, has no plans for developing the same in its implementation of the proposed rule. The Commission does not even have the authority to condemn property.

As argued in detail below, a federal government regulation creates a taking without just compensation, in violation of the Fifth Amendment, if there is no meaningful connection between the regulation and the state interests addressed, or if the effect of the regulation is to diminish the market value of private property by altering the aesthetic qualities of the property, and the responsible agency does not make the property owner whole. By implementing the proposed rule, with its wholesale abrogation of all local authority to regulate broadcast tower siting, the Commission will be in violation of the Fifth Amendment.[13]

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[12] *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994), citing *Rust v. Sullivan*, 500 U.S. 173, 190-91, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575-78 (1988).

[13] Even if the Commission had Congressional authorization to effect a taking in this instance, any such taking would be unlawful under the Anti-Deficiency Act because Congress has not appropriated funds to compensate property owners. The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures within the limits of amounts appropriated by Congress. 31 U.S.C. § 1341. Since the statute applies to "any officer or employee of the United States Government," it applies to all branches of the federal government, legislative and judicial, as well as executive. See 27 Op. Att'y Gen. 584, 587 (1909) (applying the Act to the Government Printing Office). The Comptroller General of the United States has interpreted the term "obligations" broadly and has opined that actions under the Anti-Deficiency Act include not just recorded obligations but also "other actions which give rise to Government liability and will ultimately require expenditure of appropriated funds." 55

1. A Federally-Mandated Preemption of Local Zoning Laws Would Amount to a Taking of Property Whose Value is Reduced by the Presence of a Tower.

It is not necessary for the government to physically invade or actually expropriate private property for the Fifth Amendment to apply. For example, if a restriction on the use of property is unduly harsh, a government regulation may constitute a taking. *See, e.g., Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003, *Yee v. Escondido,* 503 U.S. 519 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). There are two theories under which the preemption of local zoning rules may constitute a taking under the Fifth Amendment.

- **If there is no meaningful connection between a government regulation and the state interests advanced, there is a taking.**

Generally speaking, if the government regulates property rights in a manner reasonably calculated to advance a governmental interest, the regulation will be upheld. The Supreme Court has held however, that there must be a meaningful connection between a regulation and the state interests involved. *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Commission,* 483 U.S. 825, 837 (1987). If there is no such connection, there will be a taking, even if the property owner does not lose the use of the property. Furthermore, *Dolan* requires that there be an "individualized determination" that the burden imposed on the property owner is appropriate in light of the governmental purpose. *Dolan*, 512 U.S. at 391.

The Supreme Court has also stated that the policy underlying the Fifth Amendment is to prevent some people from bearing burdens that ought rightfully to be borne by the public as a

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Comp. Gen. 812, 824 (1975). Therefore, a rulemaking that exposes the Government to the filing of claims founded in the Fifth Amendment subjects the Government to open-ended liability that would violate the Anti-Deficiency Act.

whole. *See, e.g., PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980); *Agins v. Tiburon,* 447 U.S. 255 (1980).

The Commission's proposed policy of promoting the growth of DTV by preempting local land use regulations thus directly implicates the policy underlying the Fifth Amendment. The Commission has concluded that as a matter of national policy, zoning laws should be preempted. Under the policy enunciated in *PruneYard* and *Agins*, however, individual landowners who happen to be located near a tower site should not suffer economic harm to benefit the rest of society.

More specifically, the proposed rules directly contradict the reasoning of *Nollan* and *Dolan*. In *Nollan,* the California Coastal Commission had required the Nollans to grant an easement allowing the public access to the beach in front of their property, as a condition of the issuance of a building permit. The Supreme Court held that requiring the Nollans to give up the easement was a taking, even though they retained full use of their property. *Nollan*, 483 U.S. at 834. The Coastal Commission had authority to deny the permit because the area was subject to a development ban but the Supreme Court held that the Coastal Commission could not link the permit to the easement dedication because the easement did not serve the same purpose as the development ban. *Id.* at 837. There must be a rational relationship between the government regulation and its intended goal.

In *Dolan*, the City had conditioned approval of a permit to expand a store on the dedication of a portion of the property as a greenway and bike path. The Supreme Court struck down the requirement, not because there was no "essential nexus," as required by *Nollan*, between the building permit and the dedication requirement, but because of the degree of disparity between the burdens imposed by the permit conditions and the effect of the planned

building expansion. 512 U.S. at 391. The Court stated that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination" that the government regulation is reasonably related to the government's goals. *Id.*

For the reasons discussed in Part I, there is not a meaningful connection between the proposed rules and the federal policy because of the many other factors that are likely to prevent rapid deployment of DTV. In addition, the proposed rules are far broader than they need to be to achieve their stated purpose. Thus, there is no "essential nexus" between the goal of speedy deployment of DTV and preemption of local code provisions. Furthermore, the Commission has not conducted an "individualized determination" to ensure that the burden on a particular property owner bears a reasonable relation to the government's goals. In fact, if it preempts local zoning, the Commission will have preempted the very process designed to provide that individualized determination. Local zoning ordinances are designed specifically to make individualized determinations, when they are needed. When state and local governments go astray, as in *Nollan* and *Dolan*, they are reined in.[14] And when the federal government goes astray, it, too, must be reined in.

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[14] It is hardly the City's position that government regulations affecting property values are constitutionally defective. The City has and exercises powers of condemnation, and property owners have and will continue to argue that City zoning and code regulations impact property values. The regulatory scheme instituted by this and most municipal governments is, however, very different in intent and effect from the proposed rule. Municipal condemnations are subject to elaborate proceedings designed to ensure notice, the owner's right to be heard, and review by the courts where appropriate. And the City is obligated to pay just compensation for the property it takes. As noted, the City's zoning code similarly provides notice and due process to potentially aggrieved owners in order to ensure that the objective of serving the public good does not unfairly harm their property interests. The Code also sets forth objective standards for granting special use permits and variances that implement the balance sought between individual interests and the public good and limit the City's power. The proposed rule contains none of these basic protections. On the contrary, it would override and eliminate all such protections now provided by the City's regulatory scheme, and permit the Commission to make decisions without reference to the legitimate interests of individual property owners. Again, the

The point is to provide the maximum possible protection for private property and the rights of individual owners that is consistent with the public good. The City's zoning code supports and furthers the intent of the Fifth Amendment takings clause. The proposed rule permits no such balance, however, and in fact destroys the City's ability to protect the property interests of its citizens. The City makes land use decisions on the basis of specific facts, after due deliberation and a consideration of all affected interests, based on public hearings and a public record that ensure the right of all interested parties to be heard. The proposed rule would eliminate the City's ability to provide these basic protections to its property owners, by abrogating its traditional authority over land use and removing that authority to Washington, where decisions will be made wholesale, without reference to the interests of individual citizens.

Under the proposed rules, owners of property near antenna sites will be denied the opportunity to have their concerns addressed in the same manner as other landowners. It is likely they will suffer economic loss through reductions in their property values.[15] Because the Commission will not be able to show that it acted reasonably with respect to each individual landowner, it will not be able to argue that the preemption advanced legitimate state interests, and it will be responsible for any resulting taking.

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protections now provided by the City's zoning code have the effect of upholding the Fifth Amendment, where the proposed rule, by abrogating those protections, will violate the Fifth Amendment.

[15] See Declaration of Bernard W. Camins, Certified Real Estate Appraiser, in Support of the Comments of the City of Philadelphia ("Camins Declaration") attached as Appendix B, ¶¶ 6-9.

- **If a government regulation deprives a property owner of all or substantially all of an element in the "bundle of rights" that constitutes property ownership, there is a taking; the aesthetics of a property constitute one such element.**

On several occasions, the Supreme Court has stated that property ownership comprises a "bundle of rights," and that regulation affecting any one element in the bundle can constitute a taking. Among these separate elements of the bundle are the right to exclude, and the right to pass on property to one's heirs. *See, e.g., Kaiser Aetna v. U.S.,* 444 U.S. 164 (1979); *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Hodel v. Irving,* 481 U.S. 704 (1987). The courts have recognized that the right to light, air, and a view of the surrounding landscape or streetscape are part of the bundle of property of rights and affect value. *See generally,* Annotation, *Interference With View As a Matter for Consideration in Eminent Domain,* 84 A.L.R.2d 348 (1962). The physical appearance of the surround is equally important in determining the desirability of property to owners and to potential buyers (see Camins Declaration, ¶ 6 and Russo Declaration, ¶ 5). It is obvious that placing a thousand foot tower in the middle of a neighborhood of houses and small retail businesses lowers -- and is perceived by owners and buyers to lower -- the aesthetic quality of the neighborhood. This translates directly into diminished property values. See Camins Declaration, ¶¶ 7-8. Where the impact on market value is the direct result of Commission regulation, as will be the case if the proposed rule is allowed to override the City zoning rules that preclude broadcast towers in incompatible neighborhoods, then the Commission will be responsible for a taking without compensation.

One court has ruled that the loss of aesthetic value resulting from construction of a water tower could be a taking. *McKinney v. City of High Point,* 237 N.C. 66 (1953).

There is no question that the aesthetic qualities of a neighborhood affect the value of property in that neighborhood. Common sense alone is enough to demonstrate that people

prefer to live in attractive surroundings, and it does not take a deep understanding of economics to recognize that people will pay more for housing in aesthetically pleasing areas. Indeed, people prefer to work in attractive surroundings as well, so the values of all types of property are ultimately affected to some degree by aesthetic considerations.

In fact, preserving those aesthetic qualities is one of the purposes of zoning law. *See, e.g., People v. Stover,* 191 N.E.2d 27 (N.Y. 1963); *United Advertising Corp. v. Borough of Metuchen,* 198 A.2d 447 (N.J. 1964). For example, in *Berman v. Parker,* 348 U.S. 26, 33 (1954), Justice Douglas stated that:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . .

In addition, it is well known to real estate appraisers and brokers that perceptions drive the property market. See Camins Declaration, ¶¶ 6, 9. If an area is perceived as undesirable, potential buyers will go elsewhere, or will pay less for an otherwise comparable property. Certain kinds of land use that are perceived by the market as particularly undesirable -- airports, sewage treatment facilities, plants are examples -- have a stigmatizing effect on the areas in which they are located. See id., ¶ 9. It matters little whether the stigma results from conceptions that have little foundation in scientific fact. If potential buyers and tenants believe that a particular kind of facility or land use creates a risk of electromagnetic radiation, or intolerable noise or odor, or harmful chemical emissions, or injury from structural collapse, then they will buy or rent elsewhere.

There is little question that large tower structures are perceived by the residents of this city as highly undesirable land uses that have a stigmatizing effect on neighborhoods -- for perceived health and safety reasons as well as aesthetic reasons. See Russo Declaration, ¶¶ 5,

10. In Philadelphia, new television broadcast towers are projected to be a thousand to twelve-hundred feet in height. *Fifth Report and Order,* App. B, Table 1. Towers this high will dominate the streetscape for blocks, if not miles, around. These structures require guy wires and anchors that are placed substantial distances from the tower base, creating an installation that generally covers acres of ground. See Camins Declaration, ¶ 8. The aesthetic impact of a structure of this magnitude on an urban residential neighborhood is obvious, and certainly is perceived by residents, buyers, and tenants as strongly negative. See generally Russo Declaration, ¶¶ 5, 10. The stigma is reinforced by fears, justifiable or not, of harmful radio frequency emissions, and by the fear that collapse of a twelve hundred foot tower could injure adjacent property or persons.[16] The effect will be to seriously diminish property values.

Moreover, the large majority of properties in Philadelphia are residential properties. See Camins Declaration, ¶ 10. Philadelphia, like other major urban areas of the Northeast, has experienced significant job and population losses over the last two decades. As a result, many of our neighborhoods have more residential and commercial properties available than there are buyers. The stigmatizing effect of broadcast towers will be exacerbated in such areas, with a correspondingly greater impact on property values. See Camins Declaration, ¶¶ 8, 11. The purpose of our zoning code is to permit the City to evaluate such impacts and make reasonable decisions that will protect our citizens' interests where they need protection. The proposed rule will deprive the City of all authority and ability to perform this basic function of good municipal government.

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[16] As noted earlier, just last week an 1800 foot broadcast tower collapsed in Jackson, Mississippi, apparently while routine maintenance work was under way on the support cables, killing three employees of a Montreal, Canada based construction company. "TV Tower Crash Kills 3 Canucks," The Toronto Sun, p. 42. The concerns of our citizens are not without foundation.

Nevertheless, if the Commission were to preempt the City's zoning laws, broadcasters would essentially be free to install their antenna towers anywhere in the City that they chose. If the most practical place to build a tower happened to be in the middle of a residential area, adjacent to a park, or across the street from Independence Hall, there would be little the City could do. Yet the appearance of the tower would clearly affect the aesthetics of the area surrounding the tower. In fact, since a new tower might well rival in height the tallest buildings in the City, the effects of such a tower will be felt over a very large area.

Thus, by building a tower, a broadcaster would reduce the aesthetic qualities of the surrounding area. This illustrates that aesthetic qualities are a characteristic that can be severed from the rest of the property. The property is still habitable, still economically useful, but an important piece of it has been cut off. Aesthetic value is therefore part of the bundle of rights just as much as the right to exclude was in *Nollan*, or the right to devise the property in *Hodel*. *See McKinney v. High Point.* By authorizing a broadcaster to harm the aesthetics of an area, the Commission may thus effect a taking of that element in the bundle of rights belonging to affected property owners.

2. The Commission Has No Authority To Take Property.

The relevant scope of the Commission's jurisdiction is limited by Section 2(a) of the Act, 47 U.S.C. § 152(a), to "interstate and foreign transmission of energy by radio . . . and to all persons engaged ... in such communication or such transmission of energy by radio . . . and to the licensing and regulating of all radio stations as hereinafter provided." To exercise this jurisdiction, the Commission may only use the powers specified in Section 303. Neither Section 2(a) nor Section 303 gives the Commission the power to regulate tower structures

(beyond the marking requirements of Section 303(q)) or antenna tower siting.[17] Accordingly, the Commission's exercise of jurisdiction under Title III is limited to the activities of licensees as licensees, and does not extend to every aspect of their operations, including their relations with local zoning authorities.[18]

As the D.C. Circuit made clear in *Bell Atlantic*, supra, the Congress did not confer the power of eminent domain on either the Commission or its regulatees. In any event, where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in a U.S. district court under 28 U.S.C. § 1358. We have found no other section of the U.S. Code that would authorize the Commission to deviate from the prescribed procedure.

Nor can the Commission's lack of explicit statutory authority to take private property be rectified by a reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the Federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Since the Constitution, Art. I, §§ 8 and 9, assigns to Congress the exclusive control over appropriations, the courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in the instance of a taking of private property for public use as required under the Fifth Amendment to the Constitution.

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[17] In addition, the Commission lacks jurisdiction over real property ownership, even when used in a regulated activity. *See Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic, supra.*

[18] For example, the Commission does not have jurisdiction over contractual disputes affecting a licensee. *See Application of Kirk Merkley,* 94 F.C.C.2d 829 (1983).

The D.C. Circuit in *Bell Atlantic*, supra, declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to defeat such constitutional claims wherever possible. The court further made clear that such a narrow construction of the laws is designed to prevent encroachment on the exclusive authority of Congress over appropriations. In so doing, the court rejected the traditional deference accorded to administrative agency interpretations as required by the Supreme Court in *Chevron v. N.R.D.C.*, 487 U.S. 837 (1984), on the grounds that such deference would provide the Commission with limitless power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U. S. Treasury.

B. The Proposed Rules Violate the Tenth Amendment by Commandeering Local Government Processes to Advance Federal Goals.

As we have discussed above, state and local laws can be preempted under appropriate circumstances. In a federal system that presumes the existence of sovereign federal and state governments, however, presumption is not lightly implied and is to be avoided where possible. One of the restrictions on preemption is contained in the Tenth Amendment, which forbids the federal government from commandeering local governmental processes. Therefore, if it has the necessary statutory authority, the Commission may regulate in an area, but it may not compel the City to do its work for it.

1. By Deeming the City's Failure To Act Within the Timeframes Required by the Proposed Rules to Constitute a Grant of a Siting Request, the Proposed Rules Would Compel the City to Enforce a Federal Regulatory Program.

In *New York v. United States,* 505 U.S. 144 (992), the Supreme Court determined that a statute that forced the State of New York to choose between two alternatives, each of which violated its sovereignty, violated the Tenth Amendment. In examining the issues, the Court

analyzed the tensions between the actions of Congress under the Commerce Clause and the Tenth Amendment:

> In some cases, the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. [citations omitted.] In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like this one, involving the division of authority between federal and sate governments, the two inquiries are mirror images of each other.

Id. at 155-56.

The Court went on to say:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty."
>
> Whatever the limits of that sovereignty may be one thing is clear: the federal Government may not compel the states to enact or administer a federal regulatory program.

Id. at 188.

Just this year the Supreme Court reinforced this principle in *Printz v. United States*, ___ U.S. _____ , 117 S.Ct. 2365, 188 L.Ed.2d 914 (1997). In that case, the Court struck down portions of the Brady Handgun Violence Prevention Act that required local law enforcement officials to conduct background investigations of gun buyers as part of a federal gun control program. The Court stated:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The federal Government may neither issue directives requiring the States to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 138 L.Ed.2d 944.

The Supreme Court has also given guidance on when a federal law or regulation does not cross the line drawn by the Tenth Amendment. In *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1982), the Court upheld federal regulations that overlapped state mining regulations, noting that the State of Virginia was not required:

> To enforce the steep slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the State by directly compelling them to enact and enforce a federal regulatory program.

Id. at 288.

The proposed rules are just as much a violation of state and local sovereignty as the laws in *New York* and *Printz*. The proposed rules do not give local governments a choice of complying or not complying. If the City fails to act within the proposed time-frames, the Commission is not going to apply its own regulatory program, as in *Hodel*; instead, the City will be "deemed" to have approved the siting request. In other words, instead of itself regulating the placement of broadcast antennas, the Commission would force the City to do as the Commission wishes, no matter what the City actually does. If the City acts within the required time-frames, it will have complied with the Commission's demand. If it does not, it will still be deemed to have done so. Thus, the City's authority to exercise that portion of the sovereignty of the Commonwealth of Pennsylvania delegated to the City under state law will have been compromised.

2. Commission Preemption of Zoning Decisions Would Violate State Sovereignty Because it Would Amount to Amendment of the City's Zoning Code Without the Consent of the City or the State.

The preemption of any rule or regulation "that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities" violates the Tenth Amendment for the same reasons that the proposed time frames do. The proposed rules essentially amend the City's zoning code to allow broadcast antenna siting (and other facilities) to be placed anywhere, regardless of how the City and the State have chosen to exercise their own sovereignty in that regard. The Commission would not be adopting its own scheme of regulation, as in *Hodel*. Nor would it be adopting laws or rules generally applicable on states and localities as well as private parties, or exercising its spending power to influence legislative decisions. *See ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996) at n.13. Instead, the Commission would be stepping into a traditional area of state and local regulation and simply erasing it. This would constitute a commandeering of local legislative processes just as surely as if the Commission had ordered the City to repeal its zoning laws.

IV. THE PROPOSED RULES WOULD EXPOSE TOWER OWNERS TO STATE LAW NUISANCE CLAIMS, FOR WHICH TOWER OWNERS WOULD HAVE TO COMPENSATE AFFECTED PROPERTY OWNERS.

Regardless of whether the proposed rules would be held to effect a taking by the Commission under applicable federal precedent, tower owners might be found liable under the doctrine of nuisance. If a property owner suffers an economic loss through the erection of a structure on nearby property, the injured landowner may have a claim against the other property owner, even if the offending structure was erected for a public purpose or under color of law.

For example, in *McKinney v. City of High Point,* 237 N.C. 66, 74 S.E.2d 440 (1953), the City of High Point erected a water tower in a residential zone, in violation of its own zoning ordinance. The Supreme Court of North Carolina found that if the presence of the tower reduced the value of the plaintiffs' property, the plaintiffs could pursue a claim that the erection of the tower constituted a taking even though no portion of the plaintiff's property had been physically invaded or expropriated. Similarly, in *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200 (4th Cir. 1986), the Fourth Circuit held that the operations of a sewage treatment plant constituted a nuisance that interfered with the plaintiff's use of their property. Therefore, under South Carolina law, the sewer authority had effected a taking. *See also Knight v. City of Missoula,* 252 Mont. 232, 829 P.2d 1220 (1991) (noise and dust from highway traffic constitutes nuisance); *Thornburg v. Portland,* 376 P.2d 100 (Ore. 1962) (noise from aircraft overhead may be nuisance that constitutes taking).

The same rule has been applied in other cases, in which the beneficiaries of the government's actions were private parties; in those cases the beneficiaries were held liable for the loss in value. *See, e.g. Sapiro v. Frisbie*, 93 Cal. App. 299 (Cal. Ct. App. 1928) (maintenance of funeral home in residential area).

The U.S. Supreme Court has also applied this rule. In *Baltimore & Potomac RR Co. v. Fifth Baptist Church,* 108 U.S. 317 (1883), a railroad had built a repair facility next to a church, under authority of an act of Congress. The noise and smoke from the railroad facility interfered with activities at the church. The Court held that merely because the railroad had lawful authority to place its facility where it did, did not mean it was immune from damages. While the law may have given the railroad the right to place its facilities wherever it chose, it was still responsible for the consequences of its action.

Similarly, if the Commission adopts the proposed rules, broadcasters may have the lawful authority to place their facilities anywhere they choose, but they will still be responsible for the consequences. If a tower is placed in a manner that constitutes a nuisance -- as indeed it might if built in close proximity to private residences -- the tower owner may be liable, just as the City was in *McKinney v. High Point.*

The irony of this situation is that one of the purposes of the zoning laws is to prevent this sort of thing from happening. The zoning laws are intended to restrict nuisances and other undesirable activities to particular areas so they do not unduly affect the general public. The proposed rule would undo a century of evolution in the law for the benefit of a single industry.

Thus, although the Commission itself might not be found liable for the cost of a taking, adoption of the proposed rules would expose tower owners to liability.

V. THE COMMISSION SHOULD NOT PREEMPT LOCAL REGULATION OF RADIO FREQUENCY EMISSIONS PRODUCED BY BROADCAST ANTENNAS.

As with the preemption of local zoning authority, the Commission has neither express nor implied authority to preempt local laws that consider the effects of radio frequency emissions in tower siting decisions. In addition, the City and other jurisdictions are concerned with any attempt to preempt such authority because it is apparent that the Commission's radio frequency emissions practices do not adequately protect public health and safety.

A. The Commission Has No Authority To Preempt Local Laws that Consider the Effects of Radio Frequency Emissions in Making Siting Decisions.

The standard for reviewing the Commissions' proposed preemption of radio frequency emissions procedures is the same as that for local zoning authority in general: the Commission must demonstrate that it has either express or implied authority. Once again, it has neither.

1. The Commission Has No Express Authority to Preempt Local Health and Safety Regulations Governing Radio Frequency Emissions.

The NPRM points to the Commission's statutory authority over the regulation of radio frequency interference and the related legislative history. NPRM at ¶ 12. At the same time, the NPRM implicitly notes that the Commission has no parallel authority over zoning restrictions on broadcast towers based on radio frequency emissions. Indeed, the Commission has no such express authority.

2. By Expressly Addressing Local Regulation of Radio Frequency Emissions of Personal Wireless Facilities in Section 332(c)(7), Congress Indicated that the Commission Has No Implied Authority to Preempt Local Regulation of Radio Frequency Emissions.

Again, if the Commission has no express authority, it may still regulate in an area if it has implied authority. There is nothing in the Communications Act, however, that indicates a Congressional policy of preempting local laws aimed at preserving the health and safety of residents of a particular community. Indeed, we would find it hard to believe that the United States Congress would ever intend for the Commission to stand in the way of local police power regulation of this type without clear, unequivocal evidence that the matter was being adequately addressed in some other fashion.

For example, in Section 332(c)(7)(B)(iv), the Act prohibits local governments from basing decisions on the siting of personal wireless facilities on concerns about radio frequency emissions. This is relevant for two reasons. First, Congress made it plain that the Commission was to establish standards governing radio frequency emissions in Section 704 of the 1996 Act. Thus, Congress at least attempted to address the public safety issue raised by such emissions. Second, by adopting Section 332(c)(7)(B)(iv), Congress also made it plain that the Commission did not have general authority to preempt local rules addressing the same topic. Prior to the

1996 Act the Commission may have had the authority to set federal standards to be complied with by licensees, but this did not mean it had authority to preempt local police power regulation. By restricting local authority over personal wireless facilities siting, the 1996 Act made it clear that the Commission had exclusive authority to set standards related to personal wireless facilities, but at the same time made it clear that it had not such exclusive authority over other areas. Thus, the Commission has not authority to preempt local antennas siting decisions that are based on the effects of radio frequency emissions.

B. The Commission's Standards and Procedures Governing Radio Frequency Emissions Do Not Adequately Protect the Public Interest.

In addition, the Commission should not preempt local decisions regarding radio frequency emissions because the Commission's own standards and procedures do not adequately address the concerns of the residents of the City. One of the primary roles of local governments is to enact health and safety legislation deemed necessary to preserve the health safety and welfare of the public. This is not one of the primary roles of the Commission, however. The Commission is primarily concerned with the efficient functioning of telecommunications markets and facilities, and its radio frequency emissions standards and policies reflect that focus.

For example, the Commission neither conducts itself nor requires measurement of radiation from new facilities to ensure that they meet its radio frequency emissions standards. Instead, it relies on self-certification. Furthermore, the Commission does not conduct periodic monitoring of sites or facilities to ensure continued compliance with its standards. Thus, unless a licensee reports its own noncompliance, or a third party happens to notice a problem, the Commission has no way of knowing whether its standards are being met. This creates a danger

to the public safety for which there would be no recourse if the authority of local governments in this area were to be preempted.

This is unacceptable to many residents of Philadelphia. If residents are concerned about radio frequency emissions, they expect to be able to have their concerns addressed, and the traditional forum for redressing such grievances is through local legislation. Federal preemption would leave the public entirely exposed, both psychologically and physiologically. The Commission's standards may be perfectly adequate form a scientific point of view, but so long as they are not policed they will neither protect the public nor address the concerns of the public. In the absence of effective federal enforcement, the City must be allowed to adopt and police its own standards, if it sees fit.

Conclusion

The Commission should recognize that far more harm than good will come the proposed preemption. The Commission also lacks authority to preempt local laws governing the placement and construction of broadcast transmission facilities. The City of Philadelphia urges the Commission to close this proceeding without further action.

Respectfully submitted,

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Attachments:
Appendix A - Declaration of Debora Russo
Appendix B - Declaration of Bernard W. Camins

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APPENDIX A